IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1153 OF 2003

Balu Pandharinath Takle
aged 24 years, Occ.: Agriculturist
residing at Panchavati Colony,
Talegaon Dabhade, Taluka Maval, ..Appellant.
District Pune. (Orig.Accused)
(At present at Yerevada Central Prison)

V/s.

1. State of Maharashra. ..Respondent.

Smt.Pranali Kakade for Appellant.

Mr.Y.S.Shinde, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 29, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the additional Sessions Judge, Pune dated July 23, 2003 in Sessions Case No.455 of 2000. The appellant Accused No.1 alongwith three others were chargesheeted and tried for offence punishable under Section 395 and 397 of I.P.Code for committing dacoity themselves and deceased Raibirsingh Niranjansingh Sandhu by forcibly taking away bag containing amount of Rs.70,000/- and gold ornaments worth Rs.7,00,000/- from the possession of the complainant-Ramesh Mohanlal Jain while he was

travelling by a rickshaw at Nigadi and further while committing dacoity used deadly weapon viz.sickle and iron rod.

2. For the nature of order that I propose to pass, it is not necessary to deal with the factual matrix or for that matter entire evidence produced by the prosecution. This is so because the sole argument canvassed before this court is that even if the finding of fact recorded by the trial Court regarding involvement of appellant/accused No.1 in the commission of some offence is accepted as it is, by no standard the appellant can be proceeded with for offence punishable under section 395 and 397 of the I.P.Code. At best, the appellant/accused No.1 can be proceeded for offence punishable under section 394 of I.P.Code of having caused voluntarily hurt in committing robbery. This conclusion is inevitable on the basis of findings reached by the trial Court. For, the trial Court in paragraph-20 of the Judgment has found as of fact that neither the complainant Ramesh Jain P.W.1 nor any other prosecution witness has disclosed involvement of accused No.3 Deepak Oswal and Accused No.4 Vilas Kalamkar or the deceased Raibirsingh were found on the scene of the offence. In other words, out of the five persons who were

chargesheeted and tried for offence of dacoity, the Court below has positively found that the prosecution has not established the presence of atleast three of those persons on the scene of offence at the relevant time. This finding of fact reached by the Court below has not been assailed by the State. On this basis, Counsel for the appellant contended that the conviction for offence punishable under sections 395 and 397 of I.P.Code cannot be sustained in law. Reliance is placed on the decision of the Supreme Court in the case of **Om Prakash and another V/s. State of Rajasthan** reported in **AIR 1998 S.C. 1220.**

3. Having considered relevant materials on record, I have no hesitation in accepting the aforesaid submission made on behalf of the appellant/accused No.1. Once the Court below had found, as of fact, that, the prosecution has failed to establish the presence and involvement of accused No.3, accused No.4 and accused Raibirsingh, who allegedly participated in the dacoity on the fateful day, by no stretch of imagination the remaining two accused can be proceeded and convicted for offence punishable under section 395 and 397 of I.P.Code. This legal position can be culled out from the exposition in the case of **Omprakash(Supra).**

4. The learned APP however, supported the order passed on the basis of observation made by the trial Court in paragraph-12 of the impugned Judgment. In paragraph-12 of the impugned Judgment, the trial Court has referred to the evidence of P.W.1 and P.W.3 to hold that the prosecution stand that there are five or more dacoits cannot be disbelieved. The trial Court has then observed that when the robbers ran away in the car, which was parked near the place of incident, "there must have been 2-3 persons in the car." One of them was driving the car and others watching the activities of the complainant as well as the persons who robbed the complainant. Interestingly, there is no legal evidence to support this finding of fact. This observation in paragraph-12, to say the least, is conjecture and surmises drawn by the trial Court. Neither P.W.1 nor P.W.3 or any other prosecution witness has expressly stated that five or more persons were engaged in the commission of crime. P.W.1 has stated that two persons were involved; whereas P.W.6 has stated that three persons were involved. Even if the prosecution evidence is taken as it is, none of the prosecution witness has deposed that five or more than five persons were involved in the commission of the

offence. Besides, none of these prosecution witnesses have spoken about the fact that two or three persons must have been waiting in the car parked near the scene of offence, in which robbers escaped. If such is the nature of evidence on record, it is unfathomable that the observation noted in paragraph-12 of the impugned Judgment that there must have been 2-3 persons waiting in the car, to justify the finding of guilt for offence under section 395 and 397 of I.P.Code, can be countenanced either in fact or in law. Accordingly, this appeal ought to succeed on accepting the argument of the appellant that the prosecution has failed to establish that offence was one under section 395 and 397 of I.P.Code, instead, the appellant can be proceeded for offence under section 394 of I.P.Code on accepting the finding of fact recorded by the trial Court as it is.

5. The next question, that will have to be considered is the quantum of sentence. If the finding of guilt in respect of offence under section 395 and 397 of I.P.Code was to be upheld, there can be no doubt that the trial court was right in awarding minimum sentence as provided by the law being rigorous imprisonment for a period of seven

years and also fine of Rs.5,000/- i.d. to undergo further R.I. for six months. However, undisputably the offence under section 394 of I.P.Code is a lesser offence. Indeed, the offence under section 394 of I.P.Code is also punishable with imprisonment for life, or with rigorous imprisonment for a term which may extend to 10 years, and also be liable to fine. However, offence under section 394 of I.P.Code being a lesser offence, the sentence, will have to be lesser than the sentence for the offence under section 395 and 397 of I.P.Code. If the trial Court provided punishment of seven years for the offence under section 395 and 397 of I.P.Code, surely there will be lesser sentence for offence under section 394 of I.P.Code than the term of sentence awarded by the trial Court. The question is: what should be the quantum of sentence. After hearing both counsel, in my opinion, ends of justice will be met, if the sentence is reduced to one already undergone by the appellant; for the simple reason that it is not in dispute that the appellant is in custody since 11th August, 2000. He has already completed six years of actual jail. He must have earned some remission. Learned APP is not in a position to make statement in this behalf for want of instruction. Be that as it may, as the appellant is in jail for over six years

and must have earned some remission, the appeal would succeed by reducing quantum of sentence to one already undergone by the appellant.

5. Accordingly, this appeal partly succeeds. The impugned Judgment and Order is set aside to the extent of having recorded finding of guilt for offence punishable under section 395 and 397 of I.P.Code. Instead, the appellant is convicted for the offence punishable under section 394 of I.P.Code. Punishment for offence under section 394 is quantified as sentence already undergone by the appellant so far in connection with the offence in question. It appears that the appellant is in jail since 11th August, 2000 and was never released on bail since then. The appellant be set at liberty unless required to undergo sentence for any other offence.

6. Rest of the direction given by the trial Court regarding disposal of the Muddemal Property would remain as it is. Ordered accordingly.